

Protest of contracting )  
COMCRAFT, INC. ) Date: May 28, 1992  
Solicitation No. 059991-91-A-0135 ) P.S. 92-20

## DECISION

Comcraft, Inc., protests the termination of a contract awarded to it under Solicitation No. 059991-91-A-0135 for an EPABX telephone system to be installed at the Oxnard, CA, Mail Handling Annex. Comcraft alleges that it was in full compliance with the specifications and its contract should be reinstated.

The solicitation was issued by the Procurement and Materiel Management Service Office, Bell, CA, on September 30, 1991. Section 4.5 of the specification stated as follows:

4.5 Redundant Common Control - The EPABX shall be provided with a redundant processor or distributing processing architecture. In the event of a main processor or distributed processor failure, the system will automatically transfer to the second processor or continue to operate on the remaining distributed processors. The second processor or the distributed architecture will allow the entire system to continue to operate without any or minimum loss to the common control continuity.

Award was to be made to the responsible offeror submitting the most advantageous proposal, "cost or price and other factors specified elsewhere . . . considered." The solicitation listed four technical/management factors and specified that the technical/management proposals would be evaluated prior to evaluation of price.

Comcraft proposed a NEAX1400 IMS ("1400") system, manufactured by NEC America. The contracting officer determined that Comcraft's proposal was the most advantageous and awarded a contract to it on March 13, 1992. On March 16, one of the other offerors, GTEL, a subsidiary of GTE California, protested to the contracting officer the award to Comcraft. The basis of GTEL's protest was that the equipment offered by Comcraft did not meet the requirements of Section 4.5. According to GTEL, Comcraft's offered equipment has a single main processor, which, should it fail, would

cause the entire system to fail. The contracting officer solicited comments from Comcraft on the protest<sup>1/</sup> and asked the evaluation committee to re-examine Comcraft's proposal. A member of the evaluation committee contacted NEC, which advised that although the failure of the 1400's main processor was unlikely, in the event of such a failure, the whole system would fail. On the basis of that advice, the contracting officer concluded that GTEL's protest was meritorious. By separate letters dated March 27, she advised GTEL and Comcraft that Comcraft's contract would be canceled,<sup>1/</sup> the solicitation reinstated, and another award made in accordance with the solicitation.

Comcraft couches its protest as one against the contracting officer's decision that GTEL's protest had merit. Comcraft reasserts that its system is of the distributed processor architecture type, is in full compliance with the specifications, and is more cost effective than a redundant system. It states that through "distributed processing, [it] can provide an exceptionally reliable telecommunication system demonstrated with a mean time between failure rating of greater than 39,447 hours." Its proposal states that "[i]n the unlikely event of a processor failure the effect on the overall system operation will be minimal." Comcraft declares that during negotiations the Postal Service did not express any concerns relating to this particular specification.

Comcraft restates its concern that in an earlier case it raised similar objections to a system proposing a distributed architecture, only to have the competing system found acceptable.<sup>1/</sup> Comcraft requests that her decision be reversed. Alternatively, Comcraft suggests that the specification is vague, should be revised, and the solicitation re-solicited.

In her report, the contracting officer states that, after discussions with the evaluation committee, which had consulted a representative of NEC America, she determined that although the NEAX1400 IMS system is a distributed processor system, it has only one main system processor, which controls the remaining distributed processors. She concluded that in the event of a failure of the main processor, the system would not continue to operate on remaining distributed processors, as the specification requires. The officer states that the claimed mean time between main processor failures of 38,447 hours is not relevant to the system's ability to meet the specification requirement. She also states that the fact that the evaluation committee did not express concern about this requirement initially does not invalidate her post-award determination that Comcraft does not meet the technical specifications.

<sup>1/</sup> Comcraft's comments asserted that the 1400 offered a distributed processing architecture which met the solicitation's requirements, and contended that the situation was identical to an instance in which it had proposed a redundant central processor system for the Memphis, TN, General Mail Facility, but was second to an offer from Executone proposing a distributed processing architecture system. Comcraft notes that it protested Executone's proposals, but that its "protest was denied by the USPS on the basis of the RFP specification calling for redundant processors OR distributing processing architecture . . . ." (Emphasis in original.)

<sup>2/</sup> The contract contained the standard termination for default and termination for convenience clauses. It also contained Clause B-9, Claims and Disputes.

<sup>3/</sup> We gather that the earlier protest to which Comcraft refers, was, like GTEL's protest here, a protest directed to and resolved by the contracting officer pursuant to Procurement Manual ("PM") 4.5.6, since we have no record of such a protest to this office from Comcraft.

Finally, the contracting officer states that if Comcraft is complaining that the specification is vague, its protest is untimely pursuant to PM 4.5.4 b and c.<sup>4/</sup>

Comcraft responded to the contracting officer's statement, reiterating that its equipment meets the specifications, which require either a redundant processor or distributed processor architecture, not both. Comcraft contends that the Postal Service is confusing the definitions of the two types of systems, stating that redundancy refers to the duplication of processors, while distributed processing refers to distributing the work load by off-loading tasks to other processors. Comcraft maintains that while both offer a highly reliable result, the distributed processor architecture system offers that result at a lower cost.

Comcraft believes that the Postal Service may have misled the manufacturer's representative when it sought clarification of Comcraft's proposal. Comcraft alleges that the Postal Service read the specification to the NEC America representative who stated that he was not certain what the Postal Service's requirement was. Comcraft contends that the Postal Service replied that redundancy was its intention, whereupon the NEC representative explained that the architecture of the NEAX1400 does not have a redundant processor. Comcraft maintains that, in fact, the specification calls for either redundancy or distributed processing.

Comcraft contends that, contrary to the contracting officer's belief, the mean time between failures is a strong indication of the reliability of the EPABX. Comcraft states that its local service office in California "maintains a complete disaster recovery NEAX1400" in the unlikely event that the main processor should fail. Comcraft alleges, however, that since the introduction of this type of system in 1988, there has never been a main processor failure.

Finally, Comcraft confirms that it believes the specification to be unreasonably vague. It suggests that the Postal Service is using different definitions of "distributed processor architecture," vacillating between the industry standard definition and a definition "more closely related to Redundant Common Control." Comcraft offers to meet with the Postal Service and any other interested parties to discuss these issues.

### Discussion

As an initial matter, we must establish whether this office has jurisdiction over Comcraft's protest. Normally this office does not review a contracting officer's decision

<sup>4/</sup> These regulations state:

#### 4.5.4

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b. Protests based upon alleged deficiencies in solicita-

c. Protests of alleged deficiencies in the solicitation after the receipt of initial proposals must be received not later than the next closing date and time for the receipt of proposals.

to terminate a contract.<sup>1/</sup> "We will not consider protests against matters of contract administration which are amenable to decision pursuant to the Contract Disputes Act of 1978, 41 U.S.C. ' 601 et seq." E-Z Copy, Inc., supra; M. L. Halle Oil Service Inc., P.S. Protest No. 85-76, November 26, 1985. (Citations omitted). Comcraft's contract contained the standard Termination for Convenience and Claims and Disputes Clauses and a challenge to the contracting officer's decision to terminate the contract, without more, would be insufficient to confer jurisdiction under our bid protest procedures.<sup>1/</sup>

However, where the termination is based on the contracting officer's determination that the initial award was improper, it is within the bid protest function to review the reasonableness of the contracting officer's actions. Browning-Ferris Industries, P.S. Protest No. 83-59, January 12, 1984; Huynh Service Company, Comp. Gen. Dec. B-242297.2, 91-1 CPD & 562, June 12, 1991; Republic Realty Services, Inc., Comp. Gen. Dec. B-242629, 91-1 CPD & 446, May 7, 1991; New England Telephone and Telegraph Company, Comp. Gen. Dec. B-197297, 80-2 CPD & 225, September 25, 1980 ("[I]t is appropriate . . . to review the validity of the procedures leading to award of the contract to the terminated contractor.") Here, we may review Comcraft's objection to the contracting officer's ultimate determination that its proposal under the solicitation that led to the award was not technically acceptable.

Our regulations state that "[e]ach proposal must be examined to determine whether it meets the requirements of the solicitation." PM 4.1.4 c. Our review of the technical evaluation of proposals in negotiated procurements is limited and "we will not substitute our judgment for that of the technical evaluators or disturb the evaluation unless it is shown to be arbitrary, capricious, or in violation of procurement regulations." C.D.E. Air Conditioning Company, Inc., et. al., P.S. Protest Nos. 92-11 & 92-18, April 2, 1992; Lazerdata Corporation, P.S. Protest No. 89-60, September 29, 1989. Generally, the contracting officer's determination will be upheld unless it is arbitrary, capricious, or unsupported by substantial evidence. International Jet Aviation Services, P.S. Protest No. 87-36, September 1, 1987; POVECO, Inc. et al., P.S. Protest No. 85-43, October 30, 1985.

There is no dispute that the system offered by Comcraft consists of one main processor which, in turn, controls various distributed processors. The specification clearly

<sup>5/</sup> The contracting officer states that she "canceled" the contract. "Cancellation of a contract has a specific legal significance: ending a contractual relationship because of a plain or palpable illegality in award due to some action or statement of the contractor, or if the contractor was on direct notice that the procedures being followed violated required procedures." E-Z Copy, Inc., P.S. Protest No. 89-85, December 1, 1989. Cancellation is proper, therefore, only where a contract is void ab initio, not where the award, although improper, is entered into in good faith. See Diverco, Inc.; Metalcastello s. r. l., Comp. Gen. Dec. B240639.2 et al., 90-2 CPD & 512, December 21, 1990. The record here reveals no such improprieties.

<sup>6/</sup> This limitation on our bid protest jurisdiction arises because we are precluded from providing a second level of administrative review when a complaint is resolvable under the Disputes clause. Jack Yanks Construction Co., [P.S. Protest No. 75-56, August 13, 1975], citing S&E Contractors Inc. v. United States 406 U.S. 1 (1972).

requires that in the event of a failure, "[t]he second processor or the distributed architecture will allow the entire system to continue to operate without any or minimum loss to the common control continuity." (Emphasis added.) Comcraft alleges that a failure of the main processor is unlikely, but does not contend that such a failure would not cause the entire system to fail. Similarly, the contracting officer does not claim that all distributed processor architecture systems would violate the requirements of the solicitation. Instead, the contracting officer rejects the particular system offered by Comcraft because failure of the main processor would cause the entire system to fail, in violation of the specification. On the basis of the record, the contracting officer's decision was not arbitrary, capricious, or in violation of our procurement regulations and her decision to terminate Comcraft's contract was reasonable. Huynh Service Company, supra.<sup>1/</sup>

Finally, with respect to Comcraft's allegations that the specifications are vague, its protest is untimely. PM 4.5.4 b., supra. Any ambiguities or vagueness should have been apparent to it before the proposal due date. These timeliness requirements are jurisdictional and we are without authority to consider protests that are not timely filed. Owens Roofing Inc., P.S. Protest No. 91-75, December 3, 1991.

The protest is dismissed in part and denied in part.

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<sup>1/</sup> Comcraft's invocation of the contrary result reached with respect to its protest of the Memphis procurement is unpersuasive. Even if the solicitation requirements were identical to the ones challenged here, as Comcraft alleges, there is no indication that the Executone system complained of had the same characteristics as the system Comcraft has proposed.